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IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC., *Petitioners*,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL., *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONERS JOSEPH SCHEIDLER, et al.

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S. C. § 1964 (c).

2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect intersection commerce "by robbery or extortion" — and which defines "extortion" as "the *obtaining* of *property* from another, with [the owner's] consent," where such consent in "induced by the wrongful use of actual or threatened force, violence, or fear" (18 U. S. C. § 1951 (b) (2) (emphasis added)) — criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

3. Whether, in this civil RICO action based on the nation-wide conduct of thousands of abortion protesters over a 15 year period, the jury's determination of liability and award of treble damages — and the procedures and instructions used by the trial court to channel the jury's decision making — satisfied the exacting standards for the protection of First Amendment rights mandated by *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 102 S. Ct. 3409 (1982).

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BRIEF FOR THE CONCERNED WOMEN FOR AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSEPH SCHEIDLER, et al.

INTEREST OF THE AMICUS

Concerned Women for America ("CWA") has over 500,000 members in all 50 states and is the largest public policy women's organization in the United States. CWA supports traditional values, encourages policies that strengthen families, and advocates virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education and policymaking which are consistent with its philosophy. Therefore, CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment. CWA believes that the decision of the lower court poses a significant threat to those rights.[1]

Theresa Schrempp, attorney for CWA, previously represented Dottie Roberts, one of the defendants in *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z. The *Roberts/Codispoti* case also involved protest at an abortion clinic.

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[1] Pursuant to Rule 37.6, of the Rules of this Court, no counsel for a party authored this brief in whole or in part, and that no person or entity other than CWA and their counsel made any monetary contribution to the preparation or submission of this brief. Counsel for petitioner Joseph Scheidler, counsel for petitioner Operation Rescue and counsel for respondents have each consented to the filing of this amicus brief. The written consent of each counsel accompanies this brief.

In that case, as in the instant case, the jury found a RICO violation based on the trial judge's re-writing of the taking element of Hobbs' Act, 18 U. S. C. § 1951 to extend the "obtaining … from" language of the Act to include "part with." The judgment was reversed on appeal in *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863 (Ninth Cir. 1995) on *res judicata* grounds. Nonetheless, the *Feminist Women's Health Center* case, like the case before this Court, demonstrates that civil RICO, combined with a dangerously expansive definition of Hobbs Act extortion, requires courts to mete out Draconian punishment for minor offenses, thereby chilling protected speech. RICO thus becomes a crushing political weapon in the hands of those who would strive to stifle the voices of others with whom they disagree.

STATEMENT

Petitioners are individuals and organizations who oppose abortion. Respondents are organizations which promote or perform abortions. Respondents allege that the Petitioners violated the Racketeering Influenced Corrupt Organizations Act ("RICO") 18 U. S. C. § 1962, when they engaged in the predicate acts of extortion under the Hobbs Act, 18 U. S. C. § 1951.

Hobbs Act extortion is well-defined, requiring the extortionist to *obtain* property. Notwithstanding the clear requirement that a defendant "obtain" property from a victim, the lower court instructed the jury that the *obtaining* element is met if a plaintiff has "give[n] up" a property right "whether or not the extortion provided an economic benefit to [defendants]. Tr. 4987. In recent

years, similar instructions regarding extortion have been given in RICO cases involving political protest. *Feminist Women's Health Center*, W. D. Wa. C86-161-Z;[2] *Northeast Women's Center v. McMonagle* 868 F.2d 1342, (3rd Cir. 1989) *cert. denied* 493 U. S. 901 (1989).[3].

This judicial expansion of Hobbs Act extortion is not merely a technical change. In shifting from a requirement that a defendant obtain property to the lesser requirement that a plaintiff give up property, the court expanded the traditional requirements for extortion. The expanded definition of extortion transforms the Hobbs Act from a statute which was enacted to penalize a crime of acquisition to a statute which criminalizes political protest and civil disobedience.

One of the several questions presented on appeal in this important case is the propriety of the trial court's expansion of common law definition of extortion to non-acquisitive behavior. By this brief, the *amicus curiae* invites the Court's attention to law

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[2] The Roberts/Codispoti jury was instructed that extortion involved activity "causing the plaintiffs to *part with* property or some valuable right." *Feminist Women's Health Center v. Roberts*, W. D. Wa. 86-161-Z; Docket No. 576; *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863 (9th Cir. 1995) ER 240-241.

[3] The District Court in *McMonagle* similarly charged the jury with "to part with" language. *McMonagle v. Northeast Women's Center, Inc.*, No. 88-2137 October, 1988, United States Supreme Ct., Petition for Certiorari, Appendix at 88.

and policy reasons to reject this expanded definition of extortion under the Hobbs Act.

SUMMARY OF ARGUMENT

The trial court awarded judgment based on a definition of Hobbs Act extortion that is contrary to the plain wording of 18 U. S. C. § 1951. The expansion of Hobbs Act extortion to non-acquisitive activities is inconsistent with basic principles of statutory construction, including the plain meaning rule, the common law meaning rule, and the principle of lenity. In the First Amendment area, the court has a duty to construe a statute to avoid constitutional difficulties.

The Seventh Circuit's opinion wholly disregards the requirement that a Hobbs Act defendant "obtain" property in order to commit the crime of extortion. The Seventh Circuit's re-writing of the Hobbs Act militates against the First Amendment rights of free speech, association, and assembly.

ARGUMENT

I. THE HOBBS ACT DOES NOT APPLY TO ACTIVITIES IN WHICH NEITHER THE DEFENDANT NOR A RELATED THIRD PARTY "OBTAIN" PROPERTY.

Liability under the Hobbs Act requires that the defendant or a related third party wrongfully "obtain" property from another. In interpreting this statute, the court must look at the elements of the traditional common law offense of extortion and the statutory and interpretive case law, all of which provide that "obtaining" property is a required element of this crime.

A. The Plain Meaning of the Word "Obtain" in The Hobbs Act Demands The Acquiring of Property.

18 U. S. C. § 1951 (b) (2) defines extortion as "obtaining" of property from another.[4] That words be given their ordinary meaning is the fundamental rule of statutory interpretation. *Russello v. United States,* 464 U. S. 16, 21 (1983). The ordinary meaning of "obtain" is "to get a hold of by effort"[5] and "to come into possession or enjoyment of (something) by one's own effort, or by request [.]"[6] The plain meaning of the Hobbs Act, as demonstrated by its history, does not extend to instances in which neither the defendant nor a related third party acquired something. That the plaintiff parted with or gave up something is not legally relevant.

Where there is no ambiguity in the words chosen by the legislature, there is no room for construction. *U. S. v. Dotterweich,* 320 U. S. 277, 286 (1943) ("Congress cannot be deemed to have intended to punish anyone who is not 'plainly and unmistakably'

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[4] Section 1951 (b) (2) defines extortion as:

The term "extortion" means "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right". (emphasis added)

[5] Black's Law Dictionary defines "obtain" as: "To get hold of by effort; to get possession of; to procure; to acquire, in any way." BLACK'S LAW DICTIONARY 1078 (6TH ed. 1990).

[6] The Oxford English Dictionary defines "obtain" as: "To come into the possession or enjoyment of (something) by one's own effort, or by request; …hence, generally, to acquire, get." OXFORD ENGLISH DICTIONARY Vol. 10, 669-670 (2nd ed. 1989).

within the confines of the statutes. (citations omitted)". *See, also, United States v. Wiltberger,* 5 Wheat. 76, 95-96 (1820). Moreover, in interpreting a criminal statute, the court must strictly construe all language, resolving any ambiguity in favor of lenity. *United States v. Chestnut,* 394 F. Supp. 581, 591 (S.D.N.Y. 1975) (holding that the narrow construction of criminal statute meets "least drastic means" test), *aff'd,* 533 F.2d 40 (2nd Cir.), *cert. denied,* 429 U. S. 829 (1976).

B. Common Law Extortion Required That The Defendant Obtain Property.

Common law required a taking of property to complete the offense of "extortion." Since 1285, extortion has required such a taking.[7] The requirement that the extortionist "obtain" or "receive" property were necessary elements of the crime throughout history.[8]

Although the scope of the common law offense was generally expanded by statute to include wrongful obtaining of property by a private person (as opposed to a public official) it nonetheless

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[7] Westminster I, 3 Edw. c 26, 27, 28, 30, 31 (1285), Westminster II c 13 Edw. (1285).

[8] 11 Hen. 7, ch.23 (1494) (**receive** … by Color of their Office"); 33 Hen. 8, ch. 39 (1541) ("**receive** or take") (**receive** and take"); 2 & 3 Edw. 6, ch. 6 (1548) ("exact, **receive** or take"); 4 & 5 Phil. & M., ch. 3 (1557) ("exact, levy, *receive or take")* 21 Hen. 77, ch. 6 (1529*) ("take, receive or demand");* 23 Hen. 8, ch. 9 (1531) *("ask, demand, take or receive");* 27 Eliz. ch. 6 (1585) (**"receive,** take or have") 31 Eliz. ch. 6 § 2 (1589) ("have, **receive** or take"); 2 Jac., ch 5 (1604) ("take, **receive** or make benefit to his own use") (emphasis added)

continued to require an "obtaining" of property. Griep, *A Study of Statutory Blackmail and Extortion in the Several States, 44 Mich. L. Rev. 461 (1945).* Indeed, logic supports the proposition that crimes motivated by profit should be punished more severely than activity which is non-acquisitive in nature.

C. The Legislative History of the Hobbs Act Dictates the Necessity for the Element of "Obtain."

Congress enacted the Hobbs Act recapitulating the common law offense of "extortion." All federal statutes that codify traditional offenses are to be read as incorporating the historical elements of those offenses. *Morissette v. United States,* 342 U. S. 246 (1952);[9] *United States v. Bailey,* 444 U. S. 394 (1980).[10] Nothing in the codification suggests intent to remove the "obtaining" element. Accordingly, Hobbs Act extortion, like extortion defined at common law, is an acquisitive crime that requires a taking.

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[9] In *Morissette v. United States,* 342 U. S. 246 (1952), the court held that even when the statute did not state a *mens rea* for the crime, the mens rea for larceny was applied because such an element was required under pre-existing common law.

[10] This court noted in *United States v. Bailey*, 444 U. S. 394, 415 n. 11 (1980), "that Congress in enacting criminal statutes legislates against a background of Anglo-Saxon common law … and that therefore [common law concepts] may have been contemplated by Congress [when criminal statutes are enacted]." It further held that "Anglo-Saxon tradition of criminal justice, [is] embodied in the United States Constitution and in federal statutes …" *Id.* at 414.

Following the cue of a large number of western state legislatures, Congress modeled its initial criminal code on the original New York Field Code of Criminal Procedure published in 1850. Congress, in enacting the Hobbs Act defining "extortion," took its relevant language from the same New York Field Code.[11] Accordingly, in interpreting the Hobbs Act, the New York Field Code and those cases construing it control.

Under New York law, as under the common law, the question of whether extortion occurred turned on whether the defendant intended to receive or procure money or property. Other motivations did not suffice. In the Commentary to Chapter IV, Section 584 (Larceny), the Field Code Commissioners appropriately observed:

> Four of the crimes affecting property require to be somewhat carefully distinguished; robbery, larceny, extortion and embezzlement. The leading distinctions between these, in the view taken by the commissioners may be briefly stated thus: All four include the criminal acquisition of the property of another.

New York Field Code, Ch. 4 § 584 (emphasis added).

In *People v. Ryan,* 232 N.Y. 234, 133 N. E. 572, 573 (1921), a prosecution for blackmail, (one element of which was "the intent

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[11] 89 Cong. Rec. 3227 (1943) (Statement of Hobbs) ("There are two definitions [extortion and robbery] set forth in the bill, both of which are based on the New York law." *See also,* 91 Cong. Rec. 11,906 (1945) (Statements of Hobbs and Robison). The New York Field Code defines extortion as: "Extortion is the obtaining of property from another, with his consent, induced by wrongful use of force or fear, or under color of official right." New York Penal Code § 613, Ch. 6 (1865).

... to extort or gain any money or other property") the court held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the statute.[12] *See also, People v. Squillante,* 18 Misc.2d 561, 564, 185 N. Y. S.2d 357, 361 (1959) (In an extortion prosecution the court held that "'obtaining of property from another' imports not only that he give up something but that the obtainer receive something").

The Hobbs Act and case law interpreting the Hobbs Act expressly retain the requirement that property be "obtained." Congress used the term "obtaining" to affirm the requirement of the defendant's gain. Congress sought to punish only criminal activities that are motivated by profit or gain. Until *Northeast Women's Center v. McMonagle,* 868 F.2d 1342 (3rd Cir. 1989), *cert. denied,* 493 U. S. 901 (1989), no reported court had held that extortion occurs when neither the defendant nor a related third party receives a benefit.

Congress intended to limit the application of the Hobbs Act to those who wrongfully seek to gain property from another and this Court has strictly discerned and enforced that intent. This Court has previously refused to apply the Hobbs Act even to violent activities occurring during a labor strike for higher wages, because such activity does not squarely meet the requirements of the Hobbs

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[12] In discussing the elements of the crime, the Court noted: "If it were simply the foolish act of an elderly woman, moved by anger, spite or revenge, without any intent to procure or extort money, there would be no crime of blackmail." *People v. Ryan,* 133 N. E. 572, 573 (1921)

Act. *United States v. Enmons,* 410 U. S. 396 (1973). The defendants in *Enmons* did not violate the Hobbs Act because they neither intended nor acted to wrongfully enrich themselves or others, when they sought higher wages for work actually performed.

The Petitioners in this action were not business competitors of the Respondents. They stood to gain no economic benefit by their actions of engaging in sit-ins and demonstrations[13]. No related third party stood to gain any thing of value. Whatever else they might have been — no matter how much one may agree or disagree with their actions — they are not extortionists.

II. APPLICATION OF THE HOBBS ACT TO POLITICALLY MOTIVATED ACTIVITY IN WHICH NO ATTEMPT IS MADE TO OBTAIN PROPERTY IS INCOMPATIBLE WITH THE FIRST AMENDMENT.

"Public-issue picketing" and political speech occupy the very highest rung in the hierarchy of values protected by the First Amendment. *Carey v. Brown,* 447 U. S. 455, 467 (1980). Boycotts, picketing, demonstrations and other forms of free speech, petition, assembly and association are often coercive and intimidating. These forms of protected speech may result in economic loss to others. Those characteristics do not remove the

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[13] In fact, it is unclear what "extortionate acts" the jury found in the instant case. *See, Appendix G* to Petition for Writ of Certiorari.

activities from First Amendment protection. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886 (1982).

In instances in which illegal activity occurs within the context of political protest, imposition of punishment by a court must be judged "'according to the strictest law'" in order to avoid infringement of First Amendment rights. *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 919 (1982) *quoting Scales v. United States*, 367 U. S. 203, 299-300 (1961).

In the instant case, the trial court not only declined to apply the "strictest law" doctrine in instructing the jury; it expanded the definition of extortion in a manner that would practically assure that free speech rights would be violated.

The Seventh Circuit dispensed with the requirement that a defendant "obtain" property in an extortion (or the attendant RICO) case. Without requiring the obtaining of property, *any* illegal activity, however minor or non-violent, is extortionate, *because* it occurs in the context of political protest.[14] The Seventh

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[14] The RICO statute can and has been used against abortion protestors who engage in "classic" acts of civil disobedience. In *Feminist Women's Health Center v. Roberts, et al.*, W.D. Wa. C86-161Z, the plaintiffs alleged that Hobbs Act extortion occurred when defendant Sharon Codispoti and one other person sat on the steps of a building occupied by several businesses including an abortion clinic. No violence, force, injury, or threat of injury was claimed. Plaintiffs also claimed "extortion" because the anti-abortion picketers parked in the public spaces in front of the clinic. *Feminist Women's Health Center v. Roberts, supra,* Docket No. 402. On appeal, the Ninth Circuit correctly noted that parking in a public place "was not unlawful." *Feminist Women's Health Center v. Codispoti*, 63 F.3rd 863, 865 (Ninth Cir., 1995)

Circuit's formulation of the Hobbs Act can be summarized as follows: Even minor, non-violent, illegal activity, (unprotected by the First Amendment, but often present in concerted political protest) coupled with political protest (protected, though inherently coercive) equals extortion, because (according to the Seventh Circuit) the plaintiff need not prove that the defendant obtained anything.

Shockingly, under this faulty definition of the Hobbs Act, (and the resulting expansion of RICO's application) political protesters who engage in an otherwise minor illegality will be dealt with much more harshly, as extortionists and racketeers, than defendants who engage in the same conduct for non-political reasons, or for no reason. Defendants who engage in generic disorder will be dealt with, if at all, under state criminal laws and civil penalties for trespass, nuisance or similar claims for relief. Defendants who engage in identical acts in the context of attempting to persuade a business or an individual to change its course of conduct are liable under RICO. These defendants can be bludgeoned by their political opponents with claims of extortion and racketeering. The lower court's defective definition of extortion thus catapults an act of civil disobedience to a major felony.

Such an expansion of the Hobbs Act (and thus the RICO statute) if left in place, will have a profoundly chilling impact on all manner of political protest and on all acts of civil disobedience. By removing the element of acquisition, the Seventh Circuit allows

great mischief. Without requiring that an extortionist obtain property, the court will find extortion on proof that a defendant engaged in "wrongful use of actual or threatened force, violence or fear" and that issue becomes a factual question for a jury. Could anyone doubt that an Alabama jury would have found that the actions of Dr. King and others in engaging in technically illegal sit-ins on private property constituted "use of ... fear" against business owners and white customers, resulting in losses to the targeted businesses? In such a context, the chilling effect of the broadened definition becomes obvious.

Consider the holding of the Mississippi court reviewed by this Court in *NAACP v. Claiborne Hardware,* 458 U. S. 886, 895 (1982), that "many" black citizens were "overcome out of sheer fear" to "withhold their trade" from the complaining businesses. In reversing, this Court noted that the boycott included "elements of criminality and elements of majesty." The targeted businesses sustained economic losses. *NAACP v. Claiborne Hardware,* 458 U. S. 886, 888 (1982). Under the expanded definition of "extortion" formulated by the trial court and the Seventh Circuit, would not the participants in the *NAACP* boycott today be subject to RICO?

This threat to civil liberties is exacerbated by the fact that political speech often occurs in concert with others as in the instant case. Under the expanded definition of the Hobbs Act, a prosecutor (or civil RICO plaintiff) can assert extortion or RICO under vicarious liability theories of conspiracy and aiding and

abetting, if *any* member of the group engages in *any* illegal activity. Because a court may infer conspiracy from the facts,[15] a wholly innocent member of a loosely-affiliated group of protestors will likely find it impossible to secure a dismissal short of trial, if at all.[16]

No one suggests that a protestor who engages in wrongdoing should not be liable for his or her own criminal conduct.[17] The real question is: Should a political protestor's punishment be *enhanced* because the criminal activity occurred within the scope of a confrontive political protest? Such an enhancement of punishment is antithetical to the fundamental constitutional principle which holds that illegal activity, in the context of political speech, must be subjected to the "strictest law." *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 919 (1982), (citing *Noto v. United States,* 367 U. S. 290, 299 (1960).

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[15] *Ianelli v. United States,* 420 U. S. 770, 777, n. 10 (1975)

[16] In the *Feminist Women's Health Center v. Roberts,* W. D. Wa. C86-161-Z, 18 defendants were initially named. After a number of parties were dismissed by the court or by the plaintiffs, six parties proceeded to trial. Judgment was entered against three defendants. *Feminist Women's Health Center v. Roberts,* W. D. C86-161Z, Docket # 691, 693. The judgment was reversed by the Ninth Circuit. *Feminist Women's Health Center v. Codispoti,* 63 F.3rd 863 (9th Cir. 1995).

[17] Punishment for criminal conduct within the scope of political protest is, of course, subject to the "precision of regulation" standards demanded by *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886, 916 (1981), (citing *NAACP v. Button, 371 U. S. 415, 438 (1963)).*

The looming specter of a RICO liability will surely cast fear into the hearts of all citizens who choose to publicly and vigorously demonstrate their message. Where the protesting citizens' political opponents are both powerful and well financed, as they are in this case, the threat of a ruinous racketeering lawsuit will chill — nay, freeze — the free speech rights guaranteed by the Constitution. RICO cases are notoriously costly, frustratingly complex, and seemingly endless.[18] One writer has noted that:

> Many a prudent defendant, facing ruinous exposure, will decide to settle even a case with no merit....{C}ivil RICO has been used for extorsive purposes, giving rise to the very evils that it was designed to combat.

Califa, *RICO Threatens Civil Liberties,* 43 Vand. L. Rev. 805, 834 (1990)

Statutory interpretation requires that statutes be construed in order to *avoid* punishing activities which are protected by the First Amendment. *Police Dept. of Chicago v. Mosley*, 408 U. S. 92 (1971). Ironically, in this case, and in *Codispoti* and *McMonagle*, the district court re-defined an otherwise unobjectionable criminal statute in a manner which punished the exercise of free speech rights. The judicial overhaul of the Hobbs Act is wholly improper and unconstitutional.

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[18] The instant case is now in its fifteenth year of litigation. The defendants in *Feminist Women's Health Center* v. *Codispoti*, 63 F.3rd 863, 865, (Ninth Cir. 1995), endured nearly a decade of "RICO hell." The case was filed in 1986, went to trial in 1989 and was reversed by the Ninth Circuit in 1995. The judgment was reversed the judgment because (...continued)

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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the *defendants had been sued once before* (in state court in 1983) which resulted in finding of *res judicata*.